IN THE

Supreme Court of the United States

October Term, 1973

NO. 73-1475

HARRIS COUNTY COMMISSIONERS COURT, ET AL., *Appellants*

v.

RICHARD E. MOORE, ET AL., *Appellees*

On Appeal From The United States District Court For The Southern District Of Texas, Houston Division

MOTION TO DISMISS OR AFFIRM

C. ANTHONY FRILOUX, JR.
GERALD A. WOOLF
1215 First National Life Building
Houston, Texas 77002
(713) 227-4141

Attorneys for Gene Zaboroski

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

SUBJECT INDEX

	Page
1. Appellants have attempted to confuse or mislead this Court in the manner in which they have stated the "Questions Presented" on page three of their Jurisdictional Statement	4
2. Appellee contends that the provisions of Article 2351½ are constitutionally lacking	5
A. The right to vote: The right to hold elective office	7
B. Equal protection—the one man—one vote rule	9
C. Equal protection—Discrimination on the basis of race, ethnic origin or political affiliation	12
D. Equal protection—Discrimination between members of the same class	14
Conclusion	18
Certificate of Service	19
Exhibit A	21
Exhibit B	22

LIST OF AUTHORITIES

CASES

	Page
Anderson v. Martin, 375 U.S. 399	12
Avery v. Midland County, 390 U.S. 474	7, 8, 10
Brewer v. Hoxie School District No. 46, 238 F.2d 91	9
Cooper v. Aaron, 358 U.S. 1	12
Dyer v. Love, 307 F.Supp. 974	7
Ellis v. Mayor of Baltimore, 234 F.Supp. 945 (D. Md. 1964)	11
Ex Parte Yarborough, 110 U.S. 651	7
Gomillion v. Lightfoot, 364 U.S. 339	12, 13
Gray v. Sanders, 372 U.S. 368	10
Hunter v. Erickson, 393 U.S. 385	14
Hyden v. Baker, 286 F.Supp. 474 (M.D. Tenn. 1968)	11
Kaelin v. Warden, 344 F.Supp. 598 (E.D. Pa. 1971)	10
Louisiana v. U. S., 380 U.S. 145	12

CASES — Page

Loving v. Virginia, 388 U.S. 1 13
Martinolich v. Dean, 256 F.Supp. 824 (M.D. Miss. 1966).. 11
Mayo v. Lakeland Highlands Canning Co., 390 U.S. 310 ... 2
McDonald v. U. S., 9 F.2d 506 (8th Cir. 1925) 9
Reynolds v. Sims, 377 U.S. 533, 555 (1964).....7, 9, 10, 11, 13
Roman v. Sincock, 377 U.S. 695 11
Sailors v. Kent Board of Education, 387 U.S. 105 .....7, 10, 12
Sims v. Baggett, 247 F.Supp. 96 (M.D. Ala. 1965) 12, 13
Standard Computing Scale Co. v. Farrell, 249 U.S. 571 12
Strickland v. Burns, 256 F.Supp. 824 (M.D. Tenn. 1966).. 11
U. S. v. Corrick, 298 U.S. 435 2
U. S. v. Mississippi, 380 U.S. 128 12
U. S. v. Patrick, 55 F. 338 (M.D. Tenn. 1893)..... 9
Whitcomb v. Chavis, 403 U.S. 124 13

TEXAS REVISED CIVIL STATUTES

Article 2351½ 3, 4, 5, 6, 8, 15, 16, 17

TEXAS CONSTITUTION

Article V, Section 18 .....3, 14, 16, 17
Article V, Section 24 .....14, 16, 17

UNITED STATES CONSTITUTION

Fourteenth Amendment 13, 16
Fifteenth Amendment 12

IN THE

Supreme Court of the United States

October Term, 1973

NO. 73-1475

HARRIS COUNTY COMMISSIONERS COURT, ET AL., *Appellants*

v.

RICHARD E. MOORE, ET AL., *Appellees*

On Appeal From The United States District Court For The Southern District Of Texas, Houston Division

---

MOTION TO DISMISS OR AFFIRM

Comes now, Gene Zaboroski, one if the Appellees in this cause and moves this Honorable Court to dismiss the appeal herein, on the grounds that it has no jurisdiction or in the alternative to accept jurisdiction and affirm the judgment of the United States District Court for the Southern District of Texas, Houston Division, sought to be reviewed on appeal on the grounds that it is manifest that the question on which the decision of the cause

depends are so unsubstantial as not to need further argument.

In support of the Motion to Dismiss or Affirm and in opposition to the jurisdiction of this Court, Appellee submits the following statements disclosing matters or grounds against the jurisdiction of this Court.

I.

The Harris County Commissioners Court attempts to appeal from an order of the United States District Court for the Southern District of Texas, which declared Texas Statute, Article 2351½, Vernon's Civil Statutes, facially unconstitutional and issued an injunction against Appellants permanently enjoining them from redistricting the Justices of the Peace of Harris County under Texas Statute, Article 2351½, Vernon's Annotated Civil Statutes.

This Court has jurisdiction only if the decisions or orders of the court below were based on the invalidity or unconstitutionality of a state statute, and if Appellant has complied with all rules of this Court.

Rule 15, Supreme Court Rules, requires that if an appeal is from a decree of a district court granting or denying an interlocutory injunction, Appellant's Jurisdictional Statement must also include a showing of the matters in which it is contended that the Court has abused its discretion by such actions. *United States v. Corrick*, 298 U.S. 435; *Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310.

Appellants' Jurisdictional Statement does not contain any allegations or showing of matters wherein the District Court has abused its discretion and therefore under Rule

16 (a), Supreme Court Rules this Court should deny jurisdiction.

If, however, this Court accepts jurisdiction in this cause then Appellee moves that the judgment of the United States District Court below be affirmed on the grounds that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument, and in support thereof submits the following; to-wit:

II.

Judge Gene Zaboroski was elected Justice of the Peace by the voters of Precinct No. 6 in Harris County, Texas in the general elections of November 1970. His term of office as Justice of the Peace commenced on January 1, 1971, and he was to serve as Justice of the Peace until December 31, 1975. However, on June 30, 1973 the Harris County Commissioners Court, a constitutionally created body responsible for, among other duties, the supervision, control, and administration of certain voting laws enacted by the Texas Legislature, passed a redistricting order reconstituting certain Justice of the Peace and Constable Precincts including Precinct No. 6. This redistricting order was effected through the power granted to the Commissioners Court pursuant to the mandates of Article V., Section 18, Texas Constitution and Article 2351½, Texas Civil Statutes (1971). As intended and effected, ordered redistricting created new precincts primarily on the basis of racial, ethnic, and political lines, without regard to the mandates of the one man—one vote rule. As a result of the Commisisoners Court's actions, Appellee Gene Zaboroski was removed from his elected office.

1.

APPELLANTS HAVE ATTEMPTED TO CONFUSE OR MISLEAD THIS COURT IN THE MANNER IN WHICH THEY HAVE STATED THE "QUESTIONS PRESENTED" ON PAGE THREE OF THEIR JURISDICTIONAL STATEMENT.

The question raised by the findings and order of the Three-Judge District Court is a relatively simple one and is confined to the single question, "Is Article 2351½ (c) facially unconstitutional?"

The opinion of the Three-Judge District Court held that there was no compelling state interest served by the acts of the County Commissioners which "operates to truncate the term of a duly elected public official upon the circumstance that mere convenience redistricting places him in a district with others," and that "it invidiously and irrationally discriminates between him [Justices of the Peace] and others not so affected and between the effect of the votes of those who voted or were entitled to vote in his election and voters whose franchise were not so bobbed." (J.S. at 39).[1] In Appellant's Jurisdictional Statement they cite several state interests which allegedly were served by the redistricting of the Justice of the Peace and attempt to argue that such interests were compelling state interests if Appellees or the Court cannot show an element of intentional or purposeful discrimination against those Justices of the Peace removed from office. (J.S. at 11)

Appellants are again apparently confused as to the burdens of the respective parties in showing discrimination and alleged compelling state interests. They are obviously

1. References to J.S. are to Appellants' Jurisdictional Statement.

under the mistaken impression that discrimination by state action is permissible unless there is shown an element of intentional or pursposeful discrimination. This is not so. The courts have uniformly held that it is not necessary to show an element of intentional or purposeful discrimination in order to establish unequal protection under the constitution, but rather the burden is upon the Commissioners Court to justify their discriminatory actions with a compelling state interest.

Appellants allege as a compelling state interest for redistricting the Justices of the Peace and Constables Precincts the fact of their malapportioned population. Appellants have seemed to lost sight of the fact that Appellees are not contesting the fact that a malapportioned population among the Justices of the Peace and Constables Precincts might be a compelling state interest for redistricting. But, rather, Appellees are concerned primarily with the application of Article 2351½ to the redistricting ordered by the Harris County Commissioners Court.

2.

APPELLEE CONTENDS THAT THE PROVISIONS OF ARTICLE 2351½ ARE CONSTITUTIONALLY LACKING.

Sections (a) and (c) of the Article provide:

> "(a) Whenever the Commissioners Court changes the boundaries of commissioners precincts or of justices precincts it may specify in its order a future date, not later than the first date of January following the next general election, on which the changes shall become effective.
>
> If an election for any precinct office is held before the effective date of the order, the office shall be filled

at the election by the voters of the precinct as it will exist on the effective date of the change in boundaries. A person who has resided within the territory embraced in the new boundaries for the length of time required to be eligible to hold the office shall not be rendered ineligible by virtue of the precincts not having been in existence for that length of time."

"(c) When boundaries of justices of the peace precincts are changed so that existing precincts are altered, new precincts are formed, or former precincts are abolished, if only one previously elected or appointed justice of the peace or constable resides within a precinct as so changed, he shall continue in office as justice or constable of that precinct for the remainder of the term for which he was elected or appointed. If more than one justice or constable resides within a precinct as so changed or if none reside therein, the office shall become vacant and the vacancy shall be filled as other vacancies; provided, however, that in precincts having two justices, if two reside therein both shall continue in office, and if more than two reside therein, both offices shall become vacant."

The failure of the statute to *require* the Commissioners Court to delay the effective date of a change in boundaries, or redistricting, of a Justice of the Peace Precinct until "the 1st day of January following the next general election" constitutes a denial of the right to vote, denial of the right to hold office and fosters unequal protection of the law. Both the Texas Constitution and the Texas Statutes provide that the office of Justice of the Peace is elective; however, Article 2351½ circumvents both the right to vote for Justices of the Peace and the election procedure established for such voting. Additionally, Article 2351½ deprives the voters of their equal protection

rights, in that the right to vote for Justices of newly created precincts is guaranteed in some precincts and arbitrarily denied in others. Furthermore, this article deprives Appellee Gene Zaboroski of his right to hold office without due process of law in that there are no guarantees provided against summary removal or removal without cause.

A. The Right to Vote: The Right to Hold Elective Office.

In *Dyer v. Love*, 307 F. Supp. 974, 931 (N.D. Miss. 1969) the court restated the fundamental concept of the right to vote:

> "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of sufferage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."

Accord, Reynolds v. Sims, 377 U.S. 533, 555 (1964). See also, *Sailors v. Kent Board of Education*, 387 U.S. 105 (1967) (right to vote for legislative officers); *Ex Parte Yarborough*, 110 U.S. 651 (1884) (right to vote in Federal elections).

Even in the limited instances where the right to vote has not yet been specifically recognized as constitutionally required, as for certain state and local offices, the right to equal protection exists. That is, when a right to vote for certain state or local officials has been conferred by the state laws, that right must not be conferred in an arbitrary or invidiously discriminatory manner. In *Avery*

v. Midland County, 390 U.S. 474 (1968), the Supreme Court held:

> "Although the forms and functions of local government and the various units are matters of state concern, it is now beyond question that a state's political subdivisions must comply with the Fourteenth Amendment. The actions of local government are the actions of the state. A city, town, or county may no more deny the equal protection of the laws than it may abridge freedom of speech, establish an official religion, arrest without probable cause, or deny due process of law."

390 U.S. at 480.

> "The equal protection clause does not, of course, require that the state never distinguishes between citizens but only that the distinctions that are made not be arbitrary or invidious."

Id. at 484.

Undeniably the State of Texas has conferred upon its citizens the right to vote for Justices of the Peace. It also has, however, arbitrarily abridged that right as applied to certain voters. Article 2351½ denies to citizens in certain newly created precincts the right to vote, yet arbitrarily maintains that right for others. The acts of the Harris County Commissioners Court in promulgating its redistricting order of June 28, 1973, and appointing Justices of the Peace to replace certain elected officials is likewise a discriminatory abridgement of the right to vote and of the right to hold elective office.

This second right to hold office and discharge the duties of the office is similarly important.

In *United States v. Patrick*, 55 F. 338, 349 (M.D. Tenn. 1893), the court held:

> "An office is a public employment, conferred by appointment of government, and in the performance of its functions the citizen selected to represent the sovereign is in the exercise of both a private right or privilege and a public duty."

Cf. McDonald v. United States, 9 F.2d 506 (8th Cir. 1925).

A local officer such as a Justice of the Peace is required in the administration of his duties to obey and uphold the Federal Constitution. This duty has a necessary corollary the Federal right to be free from direct and deliberate interference with performance of the Constitutionally imposed duty. See, e.g., *Brewer v. Hoxie School District No. 46*, 238 F.2d 91 (8th Cir. 1956) (School district directors and superintendent held to have a constitutional right to discharge the duties of their office.) Whether the right to hold office is abridged by a deliberate interference with official duties as in *Brewer*, or by complete ouster without cause or due process, as in this case, would seem to matter little; the effect is the same.

B. Equal Protection—The One Man—One Vote Rule.

In *Reynolds v. Sims*, supra, the equal protection clause was applied to the apportionment of state legislature. The court held that every qualified resident had the right to a ballot for election of state legislators of equal weight to the vote of every other resident, and that such right was infringed when legislators were elected from districts of substantially unequal population.

The Supreme Court sought to clarify *Reynolds* in *Sailors v. Kent Board of Education*, supra and to identify the circumstances in which application of the one man—one vote rule was required. The court noted that there was no constitutional requirement that state and local officers of non-legislative character be chosen by election rather than appointment. However, the question of the applicability of the rule where elections was required was left opened and the court held, assuming arguendo "that where a state provides for an election of a local officer or agency—whether administrative, legislative or judicial—the requirements of *Gray v. Sanders* and *Reynolds v. Sims* must be met," 387 U.S. at 111.

This open question was substantially resolved by *Avery v. Midland County*, supra, decided shortly thereafter:

> "The question now before us is whether the Fourteenth Amendment likewise forbids the election of local government officials from districts of disparate population. As almost every court which addressed itself to this question, we hold that it does."

ID. at 478-479. See also the cases in which the highest state courts applied the principles of *Reynolds* to units of local government, collected at 390 U.S. 479 n. 3.

The one man-one vote rule has been applied with great breath: it has been held to govern the election of County Commissioners, *Avery v. Midland County*, supra; *Kaelin v. Warden*, 344 F. Supp. 598 (E.D. Pa. 1971); and Justices of the State Supreme Court and Courts of Appeal *Gray v. Sanders*, supra.

In *Gray* the court held that the rule must be applied to elected state executive and judicial officers as well as to their legislative brethren.

> "[O]nce the class of voters is chosen and their qualifications specified we see no constitutional way by which equality of voting power may be abated."

372 U.S. 381. *Accord, Ellis v. Mayor of Baltimore*, 234 F. Supp. 945 (D.Md. 1964), aff'd and remanded 352 F.2d 123 (4th Cir. 1965); *Hyden v. Baker*, 286 F. Supp. 475 (M.D. Tenn. 1968); *Martinolich v. Dean*, 256 F. Supp. 612 (S.D. Miss. 1966); *Strickland v. Burns*, 256 F. Supp. 824 (M.D. Tenn. 1966), all cases applying *Reynolds* to local government.

While population is the starting point and the controlling criterion for decision in apportionment controversies *Reynolds*, supra, mathematical exactness in districting is neither possible nor required. For instance in *Roman v. Sincock*, 377 U.S. 695 (1964) the Supreme Court stated that the proper judicial approach in apportionment cases was to determine whether under the particular circumstances existing, there had been faithful adherence to a plan of population-based representation, with only such minor deviations as might occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination.

The redistricting order of June 28, 1973, established new precincts having substantial and significant population variances, with one precinct having as much as three times the population of another. See Exhibit A. Such a scheme is patently invalid, and cannot be presumed even to be a good faith attempt to follow the mandate of *Reynolds*. How then, can Appellants claim as a compelling state interest redistricting to affect the one man-one vote rule.

C. Equal Protection—Discrimination on the Basis of Race, Ethnic Origin or Political Affiliation.

The United States Supreme Court has repeatedly held that a state cannot manipulate its political subdivisions so as to defeat a Federally protected right as for example, by realigning political subdivision so as to deny a person his vote because of race, *Gomillion v. Lightfoot,* 364 U.S. 339 (1960); *Sailors v. Kent Board of Education,* supra.

Nor can the restraint imposed by the Constitution on the states be circumvented by local bodies to whom the state delegates authority, *Standard Computing Scale Co. v. Farrell,* 249 U.S. 571, 577 (1919); *Cooper v. Aaron,* 358 U.S. 1, 17 (1958).

In *Gomillion* this court held that a statute passed by the Alabama legislature gerrymandering the boundaries of the city of Tuskegee "from a square to an uncouth twenty-eight sided figure" in order to disfranchise a majority of negro voters was unconstitutional as violated of the Fifteenth Amendement.

Denial or dilution of the right to vote on the basis of race has been struck down consistently by the courts, irrespective of the method utilized to bring about such denial of the franchise. See, *e.g., United States v. Mississippi,* 380 U.S. 128 (1965); *Louisiana v. United States,* 380 U.S. 145 (1965) (voter interpretation test invalid); *Andersen v. Martin,* 375 U.S. 399 (1964) (printing of candidates race on the ballot held invalid).

Gerrymandering for purposes of racial discrimination is by itself in violation of the Fourteenth and Fifteenth Amendments to the Constitution, *Sims v. Baggett,* 247

F. Supp. 96, 104 (M.D. Ala. 1965), aff'd sub nom.; *Reynolds v. Sims,* supra. There has been and should be no hesitation in striking down such contrivances when they infringe on protected rights, *Whitcomb v. Chavis,* 403 U.S. 124, 149 (1971).

In *Whitcomb* a challenge was made to state statutes establishing Marion County, Indiana, as a multimember district for the election of state representatives on the basis that the law diluted the votes of Negroes and poor persons living in the ghetto area of Marion County. This Court distinguished cases such as *Sims* and *Gomillion* and reversed the Three-Judge Court finding that the statutes were unconstitutional only because:

> "[T]here is no suggestion here that Marion County's multimember district or similar districts throughout the state were conceived or operated as purposeful devices to further racial or economic discrimination."

Undoubted and contrary to Appellants' contentions in their Jurisdictional Statement, such a purposeful motive was present and controlling in the redistricting order on June 28, 1973, by the Harris County Commissioners Court and such purposeful motives are reflected by the deposition testimony of the individual commissioners. See deposition of Commissioner Robert Eckels. Unquestionably the Supreme Court should strike down such a purposeful device to further racial and political discrimination.

The clear and essential purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination, *Loving v. Virginia,* 388 U.S. 1 (1967), and for that reason racial classifications are always constitutionally suspect, subject to the most rigid scrutiny, and bear a far heavier burden of justifica-

tion than other classifications. *Hunter v. Erickson*, 393 U.S. 385 (1969). Only a compelling and permissible state objective, independent of an impossible performance without racial discrimination, will justify such classifications. *Loving*, supra.

Similarly, gerrymandering and other such schemes when effected for the purpose of discrimination on the basis of ethnic origin, religion, wealth, or political affiliation must be held to violate the equal protection clause of the Fourteenth Amendment.

The sworn testimony presented by deposition to this court clearly reflects that (1) a primary and avowed purpose of the Commissioners Court in redistricting was to realign voting districts on the basis of race, ethnic origin and political affiliation and that (2) said redistricting was enacted for the additional purpose of creating "safe" Democratic districts composed of primarily Blacks and Mexican Americans and for the purpose of removing from office the sole elected Republican Justice of the Peace, Appellee Gene Zaboroski. See deposition of Commissioners Tom Bass and Robert Eckels.

As can be graphically seen by Appellee's Exhibit A and the feeble explanations of Appellants, they have not established a compelling state interest to justify their discriminatory actions or reverse the decision of the United States District Court below.

D. Equal Protection—Discrimination Between Members of the Same Class.

The Texas Constitution, Article V, Section 18, and Article V, Section 24, establishes County Commissioners, Justices of the Peace and Constables as county officers.

As county officers, they are members of the same class and Article 2351½ is facially unconstitutional in that it discriminates against members of the same class by treating them differently with no apparent reason or justification.

Paragraph (a) of Article 2351½ involves Commissioners Court changing a Commissioners precinct boundaries during the term of their office and provides the following:

> "It may specify in its order a future date, not later than the first day of January following the next general election, on which the changes shall become effective."

However, Paragraph (c) of Article 2351½ fails to require the Commissioners Court to delay the effective date of a change in precinct boundaries or redistricting of a Justice of the Peace Precinct until, "the first day of January following the next general election."

This obvious legislative delegation of different standards or treatment between Commissioners of a Commissioners Court in Paragraph (a), and of Justices of the Peace and Constables in Paragraph (c) of Article 2351½ is an uncontrovertable example of "unequal treatment of persons within the same class."

Additionally, there are a number of other unequal legislative directives to the Commissioners Court contained in Article 2351½ (c) which threat various Justices of the Peace and Constables different even though they are persons of the same class, *i.e.*, county elected officials of a political subdivision of a state. These are:

1. Allows some elected Justices of the Peace and Constables to remain in office and arbitrarily removes all other elected Justices of the Peace and Constables by declaring their offices vacant.

2. Allows appointment of new Justices of the Peace to vacant offices of the deposed elected Justices of the Peace or Constables without the right of the voters to elect them.

3. It provides for removal for reasons other than the sole constitutional grounds set forth in Article V, Section 24, Constitution of the State of Texas; this contravenes both the Texas Constitution prohibitions as well as the due process right against summary removal, or removal without cause, contained in the Fourteenth Amendment of the United States Constitution.

It is quite obvious that the equal protection clause, which prohibits arbitrary and invidious discrimination between citizens of the same class has been contravened by the legislative attempt to circumvent both the expressed mandate of Article V, Section 18 and 24 and the prohibitions embodied in the equal protection clause itself by the arbitrary treatment of Justices of the Peace and Constables and County Commissioners within this same county.

Additionally, Article 2351½ (c) is facially unconstitutional because of its legislative attempt to provide summary discharge of an elected official before the expiration of his constitutionally guaranteed term of office at the whim of the County Commisisoners while maintaining other similarly elected officials in office. With reference to this whimsical approach to redistricting Appellee cites

the transcript of the proceedings on January 30, 1974 wherein Judge Singleton of the Three-Judge District Court asked counsel for Appellants, "Can you think of any other incident in the entire spectrum of our government where any elected post is given that type of unlimited discretion over another elected official? Can you think of any area in our entire system of government where one body is given the unlimited discretionary power to remove from office another elected official?" Wherein Mr. Landry responded, "No, Your Honor, I cannot." (Transcript at 71-72)

The irreconcilable conflict between constitutional provisions Article V., Section 18 and Article V., Section 24 of the Texas Constitution, and Article 2351½ (c) Texas Civil Statutes is apparent on its face and is sufficient grounds for this Court to affirm the judgment of the Three-Judge District Court below.

III.

As additional support of Appellee's Motion to Dismiss or Affirm the Court's attention is directed to Exhibit B, which is an opinion of the Attorney General of the State of Texas. In Tex. Atty. Gen. Op. No. H-220, January 29, 1974 the Attorney General impliedly overrules the 1962 and 1967 Attorney General Opinions relied upon by Appellants. (J.S. at 14, 15)

This opinion, which is only advisory, goes to the essence of the question presented by this appeal and lays bear the unsound principles upon which the Harris County Commissioners Court redistricted and removed only elected officials from office.

CONCLUSION

Based upon the ruling and opinion of the Three-Judge District Court holding that there was no compelling state interest to justify the actions of the Commissioners Court and the feeble state interest set out in Appellants' Jurisdictional Statement, Appellee respectfully submits this Honorable Court should dismiss the appeal herein on the grounds that it has no jurisdiction or in the alternative accept jurisdiction and affirm the judgment of the United States District Court for the Southern District of Texas.

Respectfully submitted,

C. ANTHONY FRILOUX, JR.
GERALD A. WOOLF
Attorneys for Gene Zaboroski
1215 First National Life Building
Houston, Texas 77002
(713) 227-4141

By_____
C. ANTHONY FRILOUX, JR.

By_____
GERALD A. WOOLF

CERTIFICATE OF SERVICE

(1) The undersigned counsel for the Appellee Gene Zaboroski do hereby certify that on this_____day of April, 1974, they did deposit in the United States Mail, by Registered Mail, Return Receipt Requested, addressed to each of the following Appellants' Attorneys and other Appellees' Attorneys at the address shown, three (3) true and correct copies of this instrument, entitled, "Motion to Dismiss or Affirm".

JOE RESWEBER
County Attorney
202 Harris County Courthouse
Houston, Texas 77002

EDWARD J. LANDRY
Senior Assistant County Attorney
202 Harris County Courthouse
Houston, Texas 77002

MICHAEL R. DAVIS
Assistant County Attorney
202 Harris County Courthouse
Houston, Texas 77002

WESLEY H. HOCKER
Attorney In Charge
For Intervenor-Petitioners
Harris County Democratic Executive Committee
1020 Houston First Savings Bldg.
711 Fannin Street
Houston, Texas 77002

VIRGIL H. BARFIELD
Attorney In Charge
For Plaintiffs,
Richard E. Moore, et al
500 Houston Bar Center Building
Houston, Texas 77002

JOHN G. GILLELAND
Of Counsel
For Plaintiffs,
Richard E. Moore, et al
500 Houston Bar Center Building
Houston, Texas 77002

DAVID HOLLINGSWORTH
Of Counsel
For Plaintiffs,
Richard E. Moore, et al
500 Houston Bar Center Building
Houston, Texas 77002

JOHN M. O'QUINN
Attorney In Charge
For Intervenor-Petitioners
500 Houston First Savings Building
711 Fannin Street
Houston, Texas 77002

LARRY B. KERFOOT
Attorney In Charge
For Plaintiff,
Blackie Neeley
910 Houston Bar Center Building
Houston, Texas 77002

C. ANTHONY FRILOUX, JR.
GERALD A. WOOLF
Attorneys for Gene Zaboroski
1215 First National Life Building
Houston, Texas 77002
(713) 227-4141

By_____
C. ANTHONY FRILOUX, JR.

By_____
GERALD A. WOOLF

EXHIBIT A

	Voters in New Precincts	Difference in Largest Precinct as to Smallest Precinct	% Larger Precinct to Smaller Precinct
1.	343,765	197,865	135.0%
2.	145,960		
3.	169,959	23,999	16.0%
4.	175,769	29,809	20.4%
5.	337,844	191,884	131.4%
6.	179,977	34,011	23.0%
7.	238,401	92,411	63.3%
8.	149,863	3,903	2.6%

EXHIBIT B

THE ATTORNEY GENERAL
OF TEXAS

Austin, Texas 78711

John L. Hill
Attorney General

January 29, 1974

Opinion No. H-220

Re: Must all Justices of the Peace and Constables run at the next general election when prior to that election all the justice precinct boundary lines are changed and the precincts are renumbered.

The Honorable Ned Granger
County Attorney
County of Travis
Austin, Texas

Dear Mr. Granger:

You have advised us that the Commissioners Court of Travis County, on July 9, 1973, passed an order, effective January 1, 1974, redistricting the six justice precincts and changing the boundaries of each of them. On December 10, 1973, the Commissioners Court changed the boundaries of each of the constables precincts to conform to the justice precincts, these changes likewise to be effective as of January 1, 1974. You have not advised us of the residence of the justices or of the terms of office of each justice or constable.

Your question is whether the offices of the justices of the peace and of the constables are vacant as of January 1, 1974.

Section 18 of Article 5 of the Constitution of Texas provides, in part:

> "Each organized county in the State now or hereafter existing, shall be divided from time to time, for the convenience of the people, into precincts, not less than four and not more than eight. Divisions shall be made by the Commissioners Court provided for by this Constitution. In each such precinct there shall be elected one Justice of the Peace and one Constable, *each of whom shall hold his office for four years and until his successor shall be elected and qualified.* . . . Each county shall in like manner be divided into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one County Commissioner, *who shall hold his office for four years* and until his successor shall be elected and qualified. . . ." (emphasis added)

Article 5, Sec. 24 provides:

> "County Judges, county attorneys, clerks of the District and County Courts, *justices of the peace, constables,* and other county officers, may be removed by the Judges of the District Courts for incompetency, official misconduct, habitual drunkenness, or other causes defined by law, upon the cause therefor being set forth in writing and the finding of its truth by a jury." (emphasis added)

In *Childress County v. Sachse,* 310 S.W.2d 414 (Tex. Civ. App., Amarillo, 1958) Sachse had been elected commissioner of Childress County, commencing January 1, 1955. The Commissioners Court changed the precinct boundary lines effective April 1, 1955 and the County Judge declared Sachse's office vacant, since he did not reside in the newly described precinct. In affirming the district court order awarding Sachse back salary, the Court of Civil Appeals quoted from 20 C.J.S., Counties, Sec. 77, p. 840 as follows:

> "While a change of boundary lines of commissioner districts, or a redistricting, does not deprive a county commissioner of the right to hold office for the rest of his term, although by reason of the change his residence is without the district from which he was elected, provided it is still within the county, still he does not by becoming a resident of another district, become entitled to succeed the official in that district after the expiration of his term."

The Court held that Sachse never was legally removed from office and his office was never legally vacated or abolished. He had a constitutional and legal right to serve as commissioner of the precinct until his term expired by law. The Supreme Court, in refusing the application for writ of error, at 312 S.W.2d 380 (Tex. 1958) stated as its per curiam opinion:

> "The application for writ of error is refused. No reversible error. We approve the holding of the Court of Civil Appeals that changes in precinct boundaries do not create a vacancy in the office of County Commissioner or deprive the incumbent of the right to hold office for the remainder of his term, even though by reason of such changes his residence is not within the precinct as redefined. 310 S.W.2d 414."

This office, nevertheless, issued opinions holding that the *Sachse* case did not apply and that justice precincts were abolished and vacated upon redistricting. See for instance, Attorney General Opinion WW-536 (1958); Attorney General Opinion C-112 (1963). And compare Attorney General Opinion V-1032 (1950) and Attorney General Opinion V-1218 (1951).

However, in 1970 the Court of Civil Appeals at Dallas had before it the case of *McGuire v. Hughes*, 452 S.W.2d 29 (Tex.Civ.App., 1970, no writ). The question there was whether abolition by the commissioners court of one of two justices of the peace within a precinct had the legal

effect of reducing four year term of one of the justices to two years. The Court, in answering the question said:

> ". . . The constitutional provision is clear and unambiguous that following the first two-year term of the uneven numbered office (as was Place No. 1) thereafter, all justices of the peace would be elected for the term provided for in the Constitution, namely, four years. We hold that under such constitutional mandate the term of office to which Relator McGuire was elected in 1968 was for a period of four years, ending December 31, 1972.
>
> "It has been declared in many cases that a public office is property. . . . This is certainly true in the sense that a person elected to an office established by law, and duly qualified for same by taking the oath of office, has a property right to the possession of the office and enjoyments of its rights and emoluments all of which the Constitution protects and the courts will enforce. . . . Judge McGuire was duly and legally placed into possession of his office in 1968 for a constitutional term of four years. During that period he has the vested right and privilege to exercise the official duties of the office and to receive the compensation provided by law. Such may not be denied him by administrative edict or as a result of the Commissioners Court's action in abolishing another office in the same precinct. To sanction such would open wide a Pandora's Box of uncertainty and confusion." (452 S.W.2d at 31-32) See also *Villarreal v. Bustamante*, 480 S.W.2d 231 (Tex.Civ.App., San Antonio, 1972, no writ); Attorney General Opinion H-97 (1973).

It is our opinion therefore that justices of the peace and constables elected to a full term (as opposed to being elected to fill an unexpired term) are entitled to serve the full four years in office and that a redistricting of their precincts by the commissioners court does not vacate

their office. In this opinion we do not consider the effect of a court-ordered reapportionment.

The conclusion of this opinion is distinguishable from the situation considered in Attorney General Opinion H-219 (1974) relating to State Board of Education districts. There terms were cut short pursuant to a statutory scheme ending all State Board terms at the general election immediately following a decennial reapportionment.

SUMMARY

Justices of the peace and constables, elected to a full term, are entitled to serve the entire four years and a redistricting of their precincts by the commissioners court resulting in a justice or constable not living in his precinct, does not vacate his office.

Yours very truly,

JOHN L. HILL
John L. Hill
Attorney-General of Texas

APPROVED:

/s/ LARRY F. YORK, First Assistant

/s/ DAVID M. KENDALL, Chairman
Opinion Committee